IN THE UTAH SUPREME COURT

STATE OF UTAH,	**:**	
Plaintiff/Appellee,	**:**	
v.	**:**	**Case No. 20030847-SC**
RODNEY HANS HOLM,	**:**	
Defendant/Appellant.	**:**	

BRIEF OF APPELLEE

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AN APPEAL FROM CONVICTIONS FOR TWO COUNTS OF UNLAWFUL SEXUAL CONDUCT WITH A 16- OR 17-YEAR-OLD, UTAH CODE ANN. § 76-5-401.2 (West 2004), AND ONE COUNT OF BIGAMY, UTAH CODE ANN. § 76-7-101 (West 2004), ALL THIRD DEGREE FELONIES, IN THE FIFTH JUDICIAL DISTRICT COURT, WASHINGTON COUNTY, UTAH, THE HONORABLE G. RAND BEACHAM PRESIDING

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

Defendant appeals his convictions for two counts of unlawful sexual conduct with a 16- or 17-year-old and one count of bigamy, all third degree felonies. The Utah Court of Appeals certified the appeal to this Court under Utah Code Ann. § 78-2a-3(3) (West 2004). This Court has jurisdiction under Utah Code Ann. § 78-2-2(3)(b) (West 2004).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Issue 1: In Utah, a person commits bigamy if, knowing he has a husband or wife, he cohabits with another person. Cohabit means to live together as if husband and wife. Defendant admits that he lived as husband and wife with his legal wife's younger sister after marrying her in a religious ceremony.

Is the statutory term "cohabit" unconstitutionally vague as applied to defendant's conduct?

Issue 2: A person also commits bigamy in Utah if, knowing he has a husband or wife, he purports to marry another person. Defendant admits he married his legal wife's younger sister in a religious, but unlicensed, wedding ceremony in which they were pronounced "legally and lawfully husband and wife."

Did defendant purport to marry his sister-in-law?

Issue 3: Defendant admits that he knew he already had a legal wife when he married his 16-year-old sister-in-law in a religious, unlicensed wedding ceremony.

(a) Is the statutory phrase "purports to marry" unconstitutionally vague as applied to defendant's conduct?

It is a defense to unlawful sexual conduct with a 16- or 17-year-old that the minor was married to the defendant. Defendant admits that he knew his bigamous marriage to his 16-year-old sister-in-law would not be recognized as valid under Utah law.

(b) Would an ordinary person understand that an invalid bigamous marriage could not be raised as a defense to unlawful sexual conduct with a 16- or 17-year-old?

Issue 4: Utah has jurisdiction to prosecute any person who commits an offense "either wholly or partly within the state." The victim testified that when she was 16- and 17-years-old, defendant regularly had sexual intercourse with her in their Hildale, Utah home.

Did Utah have jurisdiction over defendant's two unlawful sexual conduct with a 16- or 17-year-old charges?

Issue 5: Rule 702, Utah Rules of Evidence, permits expert testimony if it "will assist the trier of fact to understand the evidence or

to determine a fact in issue." The trial court excluded as irrelevant defense-proffered expert testimony on the religious, social, and cultural aspects of defendant's polygamous community.

Was expert testimony regarding the sociology of defendant's community relevant to defendant's bigamy and unlawful sexual conduct charges?

Issue 6: The Supreme Court held in *Lawrence v. Texas* that private sexual conduct between consenting adults is protected under the federal Due Process Clause. The Supreme Court expressly excluded from its holding sexual conduct between adults and minors and legitimate state regulation of public social institutions.

Does *Lawrence* give defendant a fundamental due process right to have more than one wife or to have sex with a minor?

Issue 7: The Supreme Court has held that a neutral law of general applicability does not violate the Free Exercise Clause, even if the law incidentally burdens a particular religious practice. This Court recently held in *State v. Green* that Utah's bigamy was such a law.

Does Utah's bigamy statute violate defendant's First Amendment free exercise rights?

Issue 8: A facially neutral law does not unfairly discriminate merely because it has a "disproportionate impact" on a protected class. Rather, the law must also have an unlawful discriminatory purpose. This Court held in *Green* that Utah's facially neutral bigamy statute did not target only religiously motivated bigamy.

Does Utah's bigamy statute unfairly discriminate against religious polygamists?

Issue 9: The First Amendment protects the right to freely associate with others for the purpose of exchanging ideas and pursuing expressive goals. Utah's bigamy statute prohibits a legally

married person from entering into additional spousal-type relationships.

Does Utah's bigamy statute prevent defendant from freely associating with others for the purpose of exchanging ideas and pursuing expressive goals?

Issue 10: Utah law allows consensual sexual contact between adults and 16- and 17-year-olds who are legally married to each other. Utah law does not allow consensual sexual contact between older adults and 16- and 17-year-olds who are not legally married to each other.

Does Utah have a rational basis for prohibiting adults from having sex with minors outside the protective umbrella of a legal marriage?

Issue 11: The Utah Constitution provides that "polygamous or plural marriages are forever prohibited." Utah's bigamy statute prohibits polygamous marriages.

Does Utah's anti-bigamy statute violate the Utah Constitution?

***Standards of Review*:** Except for Issue No. 5, the foregoing issues present questions of law, which are reviewed for correctness. *See State v. Green*, 2004 UT 76, ¶ 42, 507 Utah Adv. Rep. 45 (constitutional challenges to statutes); *State v. MacGuire*, 2004 UT 4, ¶ 8, 84 P.3d 1171 (statutory interpretation); *State v. Payne*, 892 P.2d 1032, 1033 (Utah 1995) (district court jurisdiction). Issue No. 5 deals with the exclusion of expert testimony. A trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant constitutional provisions, statutes and rules are attached in **Addendum A**:

Utah Const. Art. III, § 1 (Irrevocable Ordinance);
Utah Const. Art. I, § 4 (Freedom of Conscience);
Utah Const. Art. I, § 7 (Due Process);
Utah Code Ann. § 76-7-101 (West 2004) (bigamy);
Utah Code Ann. § 76-5-401.2 (West 2004) (unlawful sexual conduct);

Utah Code Ann. § 76-5-407 (1) (West 2004) (marriage defense to unlawful sexual conduct);
Utah Code Ann. § 76-1-201 (1999) (jurisdiction);
Utah Code Ann. § 76-1-503 (1999) (burden of proof for jurisdiction).

STATEMENT OF THE CASE

Defendant was charged by information with three counts of unlawful sexual conduct with a 16- or 17-year-old, in violation of Utah Code Ann. § 76-5-401.2 (West 2004), and one count of bigamy, in violation of Utah Code Ann. § 76-7-101 (West 2004).[1] R1-3. R1-3. After a preliminary hearing, the trial court dismissed one count of unlawful sexual conduct and bound defendant over for trial on the remaining charges. R69; R520:101-04.

Two weeks before trial, defendant moved to dismiss all charges against him, arguing that both the bigamy and the unlawful sexual conduct statutes were

unconstitutional. R106-80. The trial court denied the motion because it was untimely under a prior trial scheduling order and because defendant had not overcome the presumption that the statutes were constitutional. R191-94.

A jury convicted defendant as charged. R356-57; R525:803-04. Defendant was sentenced to three concurrent prison terms of zero-to-five years. R504-05. The prison terms were stayed and defendant placed on 36 months' probation on the condition that he serve one year in jail with immediate access to work release. R504-06. Both the trial court and this Court denied defendant's motion for a certificate of probable cause. R507. Defendant timely appealed. R412.

STATEMENT OF FACTS[2]

Defendant was a 32-year-old police officer for Hildale, Utah when he took 16-year-old Ruth Stubbs as his third wife in a religious, but unlicensed wedding ceremony. R524:535. Ruth had only a sixth grade education. R523:430, 512. By age 18, Ruth had already given birth to two of defendant's children. R523:458-60.

Defendant legally marries Ruth's sister

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[1]This brief will cite to the current version of the Utah Code when there have been no significant amendments. When significant statutory amendments have been made, the brief will cite to version in effect at the time of the offenses.

[2]The following facts are recited in the light most favorable to the jury verdict. *See State v. Green*, 2004 UT 76, n.1, 507 Utah Adv. Rep. 45.

Ruth Stubbs grew up in Colorado City, Arizona. R523:429, 432-33. Colorado City and its adjacent twin—Hildale, Utah—straddle the Arizona/Utah border. The communities are populated primarily by members of the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS), who practice polygamy as a tenet of their religion. *See* R523:491-94; R524:510, 589-90, 593. Ruth was not raised in the FLDS Church, although her parents had once been affiliated with that church. R523:432; R524:590, 592.

Ruth was almost four when defendant, then 19, legally married her 20-year-old sister Susie. *See* R523:428, 434; State's Ex. 7 (marriage certificate). Defendant later married another woman, Wendy, as his second wife. R523:450-51. Although defendant was her brother-in-law, Ruth did not know him well. R523:441-42.

Ruth asks to marry her boyfriend

Ruth was only 13 when she began thinking of marriage. R523:436. At age 16, she decided she wanted to marry an FLDS single man she had been dating. R523:436-38; R524:593-94. To marry a member of the FLDS Church, Ruth had to seek permission from Rulon Jeffs, who was then the head, or prophet, of the church.[3] R523:438-39. So Ruth began attending FLDS meetings. R523:438. She then asked her sister Susie if

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[3]According to Ruth, only women, not the men, could seek permission to marry in the FLDS faith. R523:481.

defendant, who knew Jeffs, would arrange an appointment for Ruth so that she could ask permission to marry her boyfriend. R523:439-40.

Defendant took Ruth to see Rulon Jeffs in July 1998. R523:439-40. In a brief private interview, Ruth told Jeffs that she "felt like [she] belonged" to her boyfriend. R523:440. Jeffs did not immediately grant permission, but said that he would "inquire of the Lord." R523:482. Ruth left with the understanding that she would have to return for an answer. R523:440.

Five months later, on December 10, 1998, defendant took Ruth for a second interview with Jeffs. R523:442-443. This time, both defendant and Jeffs' son Warren were also present. R523:443-44. Instead of granting Ruth permission to marry her boyfriend, Jeffs told her, "It comes to me you belong to [defendant]." R523:445, 484. Surprised, defendant twice asked Jeffs if that was "right." R523:484. Jeffs twice replied, "Yes." R523:484.

Ruth "just cried" when she heard Jeffs' pronouncement, but told him that she would marry defendant. R523:444-45, 484-85.

Ruth marries defendant

After the interview, Ruth unsuccessfully tried to reach her boyfriend to ask him what to do. R523:446, 448. Ruth's father encouraged her to marry defendant, although he knew she was interested in another man. R524:505, 585-86. Ruth's father thought that marriage would help settle her down. R524:585-86. Ruth's mother opposed the marriage. R523:450; R524:505, 595.

Defendant told Ruth that he did not want to marry her if she was unsure or did not feel good about it. R523:484-85. After talking with family and friends, Ruth told defendant that she wanted to marry him. R524:505-08. Defendant talked to Ruth's father twice that day to seek his permission. R524:584-85, 596-97. The first time defendant came alone; the second time he came with Susie and Ruth. R524:584-85, 597. Ruth's father verbally consented to the marriage. R524:589.

On December 11, 1998, just one day after being advised to marry defendant, Ruth went to Rulon Jeffs' house in Hildale for the wedding. R523:446. "Just like [in] a movie," Ruth dreamed that the man she really wanted to marry would be there instead. R523:446. When he was not, Ruth married defendant in a private, unlicensed religious ceremony. R523:450.

Ruth wore a white wedding dress. R523:447; State's Exs. 1, 2. Warren Jeffs performed the ceremony, asking defendant if he received Ruth to be his "lawful and wedded wife." R523:454, 488; Defense Ex. 4. Warren Jeffs pronounced the two "legally and lawfully husband and wife," although defendant had not obtained a marriage license. R523:488; Defense Ex. 4.

Susie and Wendy, defendant's other two wives, witnessed the marriage. Rulon Jeffs, Fred Jessop, and defendant's mother also witnessed the ceremony. R523:454-55. Ruth's father did not attend because he was out of town. R523:450. Ruth's mother was not there because she did not want to be. R523:450.

Married life

Defendant and Ruth consummated their marriage on their wedding day. R524:541. After that, they shared a Hildale house with defendant's two other wives and "about 20 kids." R523:455. Each wife had her own room, but took turns every third night sleeping with defendant. R523:455-56; R524:541. Ruth testified that she and defendant regularly had sexual intercourse in their Hildale home for the purpose of having children. R523:456-58; R524:541.

A month or two after the wedding, in January or February 1999, Ruth discovered she was pregnant. R523:458. Ruth testified at trial that she felt "wonderful" when she learned of her pregnancy. Yet before trial, she told a State's investigator that she cried at the news because she wanted to leave defendant and now could not. R523:458-59.

The baby, Miranda, was born full term on October 5, 1999. R523:459, 461; State's Ex. 9. Ruth was 17. R523:459; State's Ex. 9. After Miranda's birth, defendant and Ruth continued to have regular sexual intercourse in their Hildale home. R523:459-60. Ruth was soon pregnant again with Winston, who was born full term on October 16, 2000. R523:460-61; State's Ex. 8. Ruth had turned 18 only three months earlier. State's Ex. 9.

During their marriage, defendant warned Ruth that he could lose his job as a police officer if people from outside the community learned he had married her at such a young age. R523:463. He chastised Ruth when he learned she had disclosed her marital status to a woman who worked for the local court. R523:463. He also cautioned her to

act like they were not married when police officers from other jurisdictions were around. R523:467.

Although Ruth believed defendant was a good provider, she and the children in fact relied on food stamps and Medicaid for their support. R524:514-15.

Ruth leaves

Ruth left defendant on December 9, 2001, three years after she married him. R523:468-69. She took Miranda and Winston to her sister Pennie's home in Phoenix. R523:469-70. Fearing that defendant would fight for custody, Ruth retained a lawyer. R523:477. On Pennie's advice, she also talked to law enforcement about her relationship with defendant. R523:511.

In September 2002, Ruth typed a document purporting to "settle and permanently resolve all issues before the [custody court] in this case." R523:476-77; State's Ex. 3. Although the document originally bore her attorney's name, Ruth scribbled it out. R523:476-77;State's Ex. 3. A redacted version of the stipulation was received as an exhibit at trial. *See* R523:476-79; State's Ex. 3. The stipulation stated that defendant and Ruth "entered into a spiritual covenant of marriage on December 11, 1998, in Washington County, Utah," and that "[a]lthough they do not have a civil marriage contract, they regarded each other as husband and wife." State's Ex. 3. Both defendant and Ruth signed the agreement on September 23, 2002. State's Ex. 3; R523:477.

Attached to the typewritten document was a paragraph, handwritten by Ruth, that said, "I am willing to help [defendant] stay out of jail. As soon as the custody case has

been resolved I will be willing to talk to who ever is helping [defendant] out of jail. I do not want [defendant] to go to jail." State's Ex. 3. Ruth signed this note the same day she signed the custody agreement. *Id.* Ruth explained that she wrote this note to let defendant know "that I'm going to help him . . . [i]n any way I can help him. Just to stay out of jail, to give him visitation, so that I wouldn't be on his case anymore." R523:479.

After signing this agreement and writing the note, Ruth refused to appear at the preliminary hearing unless she was personally served with a subpoena. R57-60; R520:28-29. Ruth had earlier promised to appear without personal service and had authorized her attorney to accept service for her. R520:11, 25-26, 28-29, 31. Because the State was unable to locate Ruth for personal service, she did not appear at the preliminary hearing. R520:10-21.

SUMMARY OF ARGUMENT

Point I: Defendant argues that the "cohabit" prong of Utah's bigamy statute is unconstitutionally vague, both facially and as applied to his conduct. Defendant may not mount a facial vagueness challenge to the bigamy statute because he has not shown that it implicates any First Amendment freedoms. Defendant's as-applied challenge fails under this Court's recent opinion in *State v. Green*, 2004 UT 76, which rejected a vagueness challenge to the bigamy statute as applied to conduct materially identical to that of defendant's.

Point II: Defendant argues that he should not have been convicted under the "purports to marry" prong of the bigamy statute because that phrase cannot reasonably be

read to include second unlicensed, solemnized marriages. The Court need not reach this issue because defendant's bigamy conviction is valid on the independent ground that he cohabited with Ruth. Finding that defendant's conduct did not amount to "purports to marry," therefore, would not afford him any relief. In any event, the bigamy statute's plain language and clear legislative intent demonstrate that "purports to marry" does include second unlicensed, solemnized marriages.

Point III: Defendant argues that if "purports to marry" includes unlicensed marriages, that phrase is unconstitutionally vague as applied to him. Again, the Court need not reach this claim because his bigamy conviction rests on the independent ground of cohabitation. In any event, a person of ordinary intelligence would readily recognize that the bigamy statute prohibits defendant's specific conduct of marrying his sister-in-law in a religious wedding ceremony that pronounced them "legally and lawfully husband and wife."

Defendant alternatively argues that if "purports to marry" includes unlicensed marriages, then he should be able to use that unlicensed marriage as a defense to his unlawful sexual conduct charges. *See* Utah Code Ann. § 76-5-407 (making marriage a defense to unlawful sexual conduct with a 16- or 17-year-old). Otherwise, defendant claims, the unlawful sexual conduct statute would be vague as applied to him. Defendant's claim fails because no person of ordinary intelligence would believe that because he has purported to marry a 16-year-old plural wife in an unlicensed wedding

ceremony, they would be "married to each other" for purposes of the unlawful sexual conduct statute.

Point IV: Defendant argues his two unlawful sexual conduct convictions must be reversed because the State did not produce "affirmative evidence" at trial that the two charges were committed in Utah. In Utah, however, jurisdiction is not an element of the offense to be decided by the jury at trial beyond a reasonable doubt. Rather, jurisdiction is a threshold legal question for the judge to decide before trial by a preponderance of the evidence. The State, therefore was not required to present evidence at trial that the offenses happened in Utah. In any case, the State conclusively proved that defendant committed the charged offenses in Utah when Ruth testified at trial that defendant regularly had sexual intercourse with her in their Hildale home during the charged periods.

Point V: Defendant argues that the trial court abused its discretion in not permitting him to call two experts to testify about the religious, social, and cultural background of defendant's polygamous community. Because that evidence was irrelevant to any fact or issue at trial, it would not have assisted the jury. The trial court, therefore, did not abuse his discretion in excluding the testimony.

Point VI: Relying on *Lawrence v. Texas*, 539 U.S. 558 (2003), defendant claims a substantive due process to right to have more than one spouse at a time and to have sexual intercourse with a minor to whom he is not legally married. *Lawrence's* narrow holding— that consenting adults have a due process right to engage in private, consensual

sexual activity—does not support defendant's claim. Indeed, *Lawrence* expressly excluded from its holding the legitimate regulation of social institutions and sexually exploitive relationships with minors. Even if defendant did have such a right, it would have to give way to the State's legitimate and compelling interests in preserving the social institution of marriage and in protecting minors from sexual exploitation.

Point VII: Defendant challenges Utah's bigamy statute as impermissibly infringing on his First Amendment right to the free exercise of religion. This Court's recent decision in *State v. Green*, 2004 UT 76 rejected that argument.

Point VIII: Defendant claims that Utah's bigamy statute singles out religious polygamists for prosecution, thereby violating the Free Exercise and Equal Protection Clauses. Again, *Green* disposes of defendant's Free Exercise claim. Defendant's equal protection claim likewise fails because he has not shown that the bigamy statute has a discriminatory purpose.

Point IX: Defendant argues that the bigamy statute infringes on his First Amendment right to freely associate with others. The Supreme Court, however, has never defined the right to expressive association as including a right to reconfigure the social institution of marriage. Nor does the bigamy statute on its face purport to suppress the free expression of ideas or defendant's right to freely associate with others. It only prohibits him from having more than one wife at a time. Even if defendant could articulate a free association right to practice bigamy, the State has an overriding interest in prohibiting the practice.

Point X: Defendant argues that the unlawful sexual conduct statute violates equal protection because while a parent may consent to a 16- or 17-year-old's sexual relationships with an older adult within the confines of a legal marriage, a parent cannot consent to such a relationship without the benefit of marriage. Defendant asserts that the State has no rational basis for allowing older adults to have consensual sex with 16- or 17-year-olds within a legal marriage, while prohibiting the same conduct outside a legal marriage.

In fact, the State has a perfectly rational basis for treating the two relationships differently. Legal marriage affords a minor several important legal protections that an informal, invalid bigamous marriage does not. For example, a legal wife has the right to spousal support, an interest in marital property, the right to claim a marital share in her husband's estate, and the right to receive government benefits should her husband die or become disabled. A purported wife has none of those protections.

Point XI: Defendant argues that the bigamy statute is invalid under the liberty and freedom of conscience provisions of the Utah Constitution. The express language of Utah's Irrevocable Ordinance, which forever bans polygamous or plural marriages, defeats this claim. Defendant's claims that the Ordinance is invalid, even if true, would not entitle him to any relief because Utah has never attempted to repeal the Ordinance or its statutory prohibition on bigamy.

ARGUMENT

POINT I

THE TERM "COHABIT" IN UTAH'S BIGAMY STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO DEFENDANT, BECAUSE HIS CONDUCT FELL WELL WITHIN THE ORDINARY AND COMMONLY-UNDERSTOOD MEANING OF THAT TERM[4]

"A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person." Utah Code Ann. § 76-7-101(1) (West 2004). Defendant did not dispute below, nor does he now, that he knew he already had a legal wife when he married Ruth. The jury found by special verdict that defendant was guilty of bigamy both by purporting to marry Ruth and by cohabiting with her. R357.

Defendant challenges his bigamy conviction based on cohabitation by arguing that the term "cohabit" as used in Utah's bigamy statute is unconstitutionally vague, both facially and as applied to his conduct. Br. Aplt. 44-50. Defendant complains that "it is doubtful that ordinary persons residing in Utah have any idea that it constitutes criminal bigamy to live with someone in an unlicensed sexual relationship, or with a roommate in a situation that does not involve sex at all, while still legally married to someone else." Br. Aplt. 47-48. He alternatively asserts that the statutory term is vague because it

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[4]This point responds to Point IV.B, pages 44-50, of defendant's brief. The State address this point first because its resolution disposes of some of defendant's other claims.

"presents an excessive risk of arbitrary or discriminatory enforcement by officials charged with prosecuting violation of the law." *Id.* at 49.

After defendant filed his opening brief, this Court issued *State v. Green*, 2004 UT 76, 507 Utah Adv. Rep. 45. Green, another polygamist, also argued that the term "cohabit" in the bigamy statute was unconstitutionally vague both facially and as applied to him. *Id.* at ¶ 42. This Court held that Green could not mount a facial vagueness challenge to the statute because he had not shown that any First Amendment freedoms were implicated. *Id.* at ¶ 44. The Court rejected Green's as-applied challenge because his conduct fell well within the ordinary meaning of the term "cohabit" —to live together as husband and wife. *Id.* at ¶¶ 46-50.

Defendant may not facially challenge the bigamy statute for the same reasons that Green could not. Defendant also cannot prevail on his as-applied challenge because, like Green, his conduct fell squarely within the ordinary and commonly-understood meaning of "cohabit."

A. Defendant may not complain of the vagueness of a law as applied to the hypothetical conduct of others.

Under the void-for-vagueness doctrine, a criminal statute must define the offense "'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Green*, 2004 UT 76, ¶ 43 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). But vagueness challenges "'which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.'" *Id.* at ¶ 44 (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489,

495 n.7 (1982)). Absent a First Amendment violation, "[a] court will uphold a facial vagueness challenge 'only if the [statute] is impermissibly vague in *all* of its applications.'" *State v. MacGuire*, 2004 UT 4, ¶ 12, 84 P.3d 1171 (emphasis added). "A statute that is clear as applied to a particular complainant cannot be considered impermissibly vague in all of its applications and thus will necessarily survive a facial vagueness challenge." *Id.* Thus, "a court should 'examine the complainant's conduct before analyzing other hypothetical applications of the law' when a challenged statute 'implicates no constitutionally protected conduct.'" *Green*, 2004 UT 76, ¶ 44 (quoting *Hoffman*, 455 U.S. at 494-95).

Defendant does not have standing to challenge the word "cohabit" as it may be hypothetically applied to others because he has not shown that the bigamy statute implicates any First Amendment freedoms. Although defendant contends in Point XI of his brief that the bigamy statute violates his free exercise rights under the First Amendment, this Court rejected the same claim in *Green*. *See id.* at ¶¶ 16-41. And while defendant also claims the bigamy statute violates his First Amendment right to freely associate, *see* Br. Aplt. 70-76, as explained in Point IX below, the bigamy statute does not implicate that right.

In short, because the bigamy statute does not implicate any First Amendment rights, defendant may not challenge that statute as applied to the hypothetical conduct of others. Rather, he may challenge the statute only as applied to his own conduct. *See Green*, 2004 UT 76, ¶¶ 44-45.

B. "Cohabit" is not unconstitutionally vague as applied to defendant's conduct.

To prevail on his vague-as-applied challenge, defendant must show "either (1) that the statutes do not provide 'the kind of notice that enables ordinary people to understand what conduct [is prohibited],' or (2) that the statutes 'encourage arbitrary and discriminatory enforcement.'" *State v. MacGuire*, 2004 UT 4, ¶ 13, 84 P.3d 1171. Defendant has shown neither.

1. The bigamy statute is sufficiently definite to put defendant on notice that his conduct was prohibited.

As stated, defendant complains that "ordinary persons" would not understand that "it constitutes criminal bigamy to live with someone in an unlicensed sexual relationship, or with a roommate in a situation that does not involve sex at all, while still legally married to someone else." Br. Aplt. 47-48. Defendant, however, does not explain how it is that he or any other ordinary person would not reasonably understand that "cohabit," as that term is commonly understood, would cover the kind of conjugal relationship he enjoyed with Ruth. Indeed, this Court in *Green* held that the word "cohabit" was not impermissibly vague as applied to conduct materially identical to that of defendant. *Green*, 2004 UT 76, ¶ 47. Green maintained "spousal-type relationships" with four women, in addition to his legal wife. *Id.* at ¶¶ 2-3, 8, 47. At the time of his prosecution, none of Green's relationships with his wives were sanctioned by a state-issued marriage license. *Id.* at ¶ 3. Still, Green referred to each woman "as a wife, regardless of whether a licensed marriage existed." *Id.* at ¶ 47. The women likewise viewed themselves as

Green's wives and assumed his surname. *Id.* Green took turns sleeping with each of the four women and fathered children with each of them. *Id.* Green and the women also assumed spousal and parental duties. *Id.* And although they did not live in one house, they shared a collection of mobile homes with common family areas. *Id.*

This Court concluded that the bigamy statute was "sufficiently definite to have notified Green that his conduct was prohibited" because he "could find his conduct described in dictionary definitions of the word 'cohabit.'" *Id.* at 48. Dictionary definitions of "cohabit" include to "live together in a sexual relationship, especially when not legally married" or to "dwell together as, or as if, husband or wife." *Id.* (quoting *The American Heritage Dictionary of the English Language* (4th ed. 2000) and *Webster's New Dictionary, Concise Edition* (1990)). This Court further noted that it had long since adopted these dictionary definitions in interpreting "cohabitation" in a divorce decree. *See, e.g., Haddow v. Haddow*, 707 P.3d 669, 672 (Utah 1985); *State v. Barlow*, 107 Utah 292, 153 P.2d 647, 651 (1944). Drawing from the dictionary definition of cohabitation, this Court held in *Haddow* that persons cohabit when they have a "'common residency and sexual contact evidencing a conjugal association.'" *Green*, 2004 UT 76, ¶ 49 (quoting *Haddow*, 707 P.2d at 672). Concluding that Green's conduct "fit[] squarely" within these dictionary definitions, this Court determined that he was on notice that his conduct was banned by the bigamy statute. *Id.* at ¶ 49.

Defendant, like Green, can find his conduct described in the pages of the dictionary. Defendant admits that he legally married Susie and then willingly

participated in a wedding ceremony in which he received Ruth as his third "lawful and wedded wife." Defense Ex. 14; R524:534-36. Defendant shared a single home with his three wives and the twenty children they bore for him. R523:455; R524:534. Defendant bedded Ruth every third night and produced two children with her. R523:455-61; R524:541; State's Exs. 8-9. Defendant acknowledged both children as his and gave them his name. R524:537-38; State's Exs. 8-9. Although defendant and Ruth knew that their marriage was not a legal, they considered themselves married in a religious sense and "regarded each other as husband and wife." State's Ex. #3; R523:489. Members of the community also knew defendant and Ruth had married in a religious, if not legal sense. R523:490. And finally, defendant's warning Ruth to not tell outsiders of their relationship for fear he would lose his job demonstrates that in fact he knew his conduct was prohibited.

In sum, defendant's conduct, like Green's, clearly amounts to "liv[ing] together in a sexual relationship, especially when not legally married," or "dwell[ing] together as, or as if, husband or wife." *See Green*, 2004 UT 76, ¶ 48. The bigamy statute, therefore, was sufficiently definite to put this defendant on notice that his conduct was illegal.

2. The bigamy statute is sufficiently definite to discourage arbitrary and discriminatory enforcement.

Defendant next argues that Utah's bigamy statute is impermissibly vague because it encourages arbitrary and discriminatory enforcement. Br. Aplt. 49-50. Again, in an as-applied challenge, this Court "must focus on the particular conduct at hand and not on the

possible conduct of hypothetical parties." *Green*, 2004 UT 76, ¶ 51. Thus, the question is whether "law enforcement officials encountering [defendant's] circumstances would . . . be left to pursue their own personal predilections in determining the applicability of Utah's bigamy statute." *Id.* at ¶ 52. They would not.

As explained, defendant's conduct "fell unmistakably within the statute's purview, leaving no room for law enforcement officials to decide, in their discretion, that the statute's provisions should not apply." *Id.* Indeed, defendant's "conduct produced precisely the situation that bigamy statutes aim to prevent — all the indicia of marriage repeated more than once." *Id.* at ¶ 47. Defendant's vagueness challenge, accordingly, fails.

POINT II

THE COURT NEED NOT DECIDE WHETHER DEFENDANT PURPORTED TO MARRY HIS SISTER-IN-LAW BECAUSE HIS BIGAMY CONVICTION RESTS ON THE INDEPENDENT GROUND OF COHABITATION; IF THE COURT DOES REACH THE ISSUE, PARTICIPATING IN A RELIGIOUS, BUT UNLICENSED, WEDDING CEREMONY FALLS WITHIN THE STATUTORY PHRASE "PURPORTS TO MARRY"[5]

As stated, a person commits bigamy when "knowing he has a husband or wife," he either "purports to marry another person" or he "cohabits with another person." Utah Code Ann. § 76-7-101(1) (West 2004) (emphasis added). Again, the jury found by

[5]This point responds to Point III, pages 35-40, of defendant's brief.

special verdict that defendant was guilty of bigamy both by purporting to marry Ruth and by cohabiting with her. R357.

Defendant contends that the statutory phrase "purports to marry" cannot reasonably be read to include second unlicensed, solemnized marriages. Br. Aplt. 35-40. Defendant reasons that because he did not get a state-issued marriage license for his marriage to Ruth, he could not have been convicted for "purporting to marry" her. *Id.*

The Court need not reach this issue because defendant's bigamy conviction rests on the independent ground of cohabitation. Thus, even if this Court agreed that defendant did not "purport to marry" Ruth, his bigamy conviction would still stand. Should this Court nevertheless address this argument, the bigamy statute's plain language and clear legislative intent leave no doubt that "purports to marry" includes unlicensed, solemnized marriages like the one defendant entered into here.

A. This Court need not decide whether "purports to marry" includes unlicensed wedding ceremonies because defendant's bigamy conviction is valid on the independent ground of cohabitation.

Because this Court is "disinclined to issue advisory opinions," it "generally do[es] not decide issues unnecessary to the outcome of the case." *Goebel v. Salt Lake City Southern R.R. Co.*, 2004 UT 80, ¶ 13, — P.3d — . *See also Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 22, 86 P.3d 735. Deciding whether "purports to marry" includes an unlicensed wedding ceremony is unnecessary to the outcome of this case. As explained in Point I, defendant's bigamy conviction is valid based on the jury's finding that defendant cohabited with Ruth. Thus, even if this Court were to accept defendant's

interpretation of "purports to marry," his bigamy conviction would still stand and any discussion of that issue would be advisory only. *See Goebel*, 2004 UT 80, ¶ 33. Accordingly, this Court should not address it.

B. If this Court reaches this issue, the statutory phrase "purports to marry" includes unlicensed, solemnized marriages.

1. Applicable rules of statutory construction.

The "primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 11, 507 Utah Adv. Rep. 29. *See also In re Kunz*, 2004 UT 71, ¶ 8, 507 Utah Adv. Rep. 16. This Court does not have the power to rewrite a statute "to conform to an intention not expressed." *In re I.M.L.*, 2002 UT 110, ¶ 25, 61 P.3d 1038. Thus, this Court will not "'infer substantive terms into the [statutory] text that are not already there.'" *Arredondo v. Avis Rent A Car System, Inc.*, 2001 UT 29, ¶ 12, 24 P.3d 928 (quoting *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994)). With respect to the words already in the text, this Court will "'presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.'" *Id.* (quoting *Nelson v. Salt Lake County*, 905 P.2d 872, 875 (Utah 1995)). And because context is always an important consideration, this Court interprets statutory terms "'as a comprehensive whole and not in a piecemeal fashion.'" *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp.*, 2004 UT 37, ¶ 14, 94 P.3d 234

(quoting *Bus. Aviation of S.D., Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994)). But again, legislative intent is the "paramount concern" in construing statutes. *State v. Huntington-Cleveland Irrigation Co.*, 2002 UT 75, ¶ 13, 52 P.3d 1257.

2. Utah's bigamy statute prohibits all second bigamous marriages, whether or not solemnized, and whether or not licensed.

Under the foregoing principles, the threshold question is what conduct did the legislature intend to prohibit under Utah's bigamy statute, as evidenced by the statute's plain language. In *Green*, this Court recognized that the aim of bigamy statutes in general, and Utah's in particular, is to prevent "all the indicia of marriage repeated more than once." *Green*, 2004 UT 76, ¶ 47. The bigamy statute's plain language supports this conclusion. On its face, the statute punishes legally married persons for knowingly entering into a subsequent marital-type relationship, either by purporting to marry another or by cohabiting with another.

The cohabit prong of Utah's bigamy statute clearly prohibits legally married persons from entering into a second unlicensed, *un*solemnized marriage. *See Green*, 2004 UT 76, ¶¶ 46-47. The "purports to marry" prong, on the other hand, clearly prohibits legally married persons from entering into a second licensed, solemnized marriage. *See* Br. Aplt. 35-40. The question, then, as framed by defendant, is whether the legislature also intended to prohibit second unlicensed, but solemnized marriages.

The answer must be yes. It would be absurd to construe the statute to prohibit a legally married man from cohabiting with a second woman or from purporting to marry her with a license, but to permit him to purport to marry her without the license. It also would not give effect to the clear legislative intent—to prevent "all the indicia of marriage repeated more than once." *Green*, 2004 UT 76, ¶ 47.

The ordinary and accepted meaning of "purports to marry" supports this conclusion. Webster defines the verb "purport" as "to convey, imply, or profess outwardly (as meaning intention, or true character): have the often specious appearance of being, intending, claiming (something implied or inferred): impart, profess." *Webster's Unabridged Third International Dictionary* 1847 (1993). Black similarly defines "purport" as to "profess or claim, esp. falsely; to seem to be." *Black's Law Dictionary* 1271 (8th ed. 2004).

Under these well-accepted definitions, one "purports to marry" when one conveys, implies, professes, or gives the appearance that one has married when, in fact, one has not. That is precisely what defendant did, even though he did not get a marriage license. Defendant acknowledges that he and Ruth intended to enter into a marital relationship. They acted on their intent by participating in a wedding ceremony that had all the outward trappings of a legally binding marriage. Ruth wore a white wedding dress. An official from defendant's church performed the ceremony. He asked defendant if he received Ruth as his "lawful and wedded wife." He then asked Ruth if she gave herself to defendant "to be his lawful and wedded wife." After the couple assented, the officiator

pronounced the two "legally and lawfully husband and wife." Like any other wedding, there were witnesses. Someone also took photos of the newly-married couple. They waited to consummate their relationship until after the ceremony. They then lived together as if they were husband and wife, assuming marital duties and having children. Finally, both defendant and Ruth acknowledged that they "regarded each other as husband and wife." *See generally Statement of Facts*; State's Exs. 1 & 2; and Defense Ex. 4.

Everything about the foregoing conduct conveyed, implied, professed, or gave the appearance to any neutral observer that defendant and Ruth were married. Of course, as defendant acknowledges, he and Ruth could not be legally married because defendant was already legally married to Ruth's sister. Knowing that they could not be legally married, defendant and Ruth nevertheless professed by word and deed that they were in fact married. In other words, even though defendant did not obtain a marriage license, he "purported to marry" Ruth as that phrase is ordinarily understood.

Again, this is precisely the kind of conduct the bigamy statute seeks to prohibit—entering into a second marriage relationship, whether or not it is licensed. Thus, reading "purports to marry" to include unlicensed, solemnized marriages gives effect to the legislative intent, as evidenced by the plain language of the statute.

3. Reading "purports to marry" to include unlicensed marriages is consistent with the rest of the bigamy statute.

Defendant contends, however, that interpreting "purports to marry" to include unlicensed marriages will render the bigamy statute internally inconsistent. Defendant explains that a "necessary predicate for bigamy is a pre-existing *legal* marriage, not a pre-existing informal, legally unlicensed one." Br. Aplt. 37. Defendant reasons that if the first marriage in the bigamy statute must be legally licensed, so must the second one. Otherwise, defendant claims, the term "marry" will be used differently, and inconsistently, throughout the bigamy statute. Br. Aplt. 37.

This argument mistakenly assumes that a marriage can be legal or valid only if it is licensed. In fact, Utah law recognizes two kinds of marriages as legal: (1) marriages licensed and solemnized by a person authorized by statute, *see* Utah Code Ann. § 30-1-6, -7, & -8 (West 2004), and (2) unsolemnized, unlicensed marriages that are judicially or administratively decreed to have met the requirements of Utah's unsolemnized marriage statute, *see* Utah Code Ann. § 30-1-4.5 (1998) [hereinafter "§ 4.5"].

In *Green*, this Court held that an unlicensed, unsolemnized marriage declared valid under § 4.5 could serve as proof of a prior legal marriage in a consensual bigamy prosecution, like the one here. *Green*, 2004 UT 76, ¶¶ 53-56. Thus, while defendant is right that "a pre-existing *legal* marriage" is a necessary predicate for bigamy, he is wrong that an "informal, *unlicensed*" marriage cannot serve as that predicate.

If an unlicensed, unsolemnized marriage can serve as the first marriage in a bigamy prosecution, there is nothing inconsistent about reading "purports to marry" to

include second unlicensed, *solemnized* marriages. If anything, consistency requires that reading.

Defendant nevertheless contends that such a reading is inconsistent with subsection (3) of the bigamy statute. That subsection states, "It shall be a defense to bigamy that the accused reasonably believed he and the other person were legally entitled to remarry." Defendant argues that "remarry" in this subsection must also mean to "remarry legally." Br. Aplt. 37. Otherwise, defendant claims, "it would be a defense to bigamy if a person reasonably believed that he and the other person were legally entitled to enter again into an informal and legally unlicensed relationship." *Id.* Defendant reasons that if "remarry" means only "*legally* remarry," then, to be consistent, "purports to marry" must also mean "purports to *legally* marry." Br. Aplt. 37-38.

Rather than support defendant's claim, subsection (3) refutes it. Subsection (3) says "*legally* . . . remarry." Utah Code Ann. § 76-7-101(3) (emphasis added). If "remarry" meant "legally remarry" as defendant claims, the word "legally" would be redundant. The legislature, however, did not use the word "legally" to modify "purports to marry." Thus, "marry" in that phrase necessarily includes a non-legal marriage as well as a legal one.

Subsection (3) is not inconsistent with "purports to marry" as written for another reason. That subsection does nothing more than provide a defense to those who are legally married, whether by license or under § 4.5, and who mistakenly, but reasonably, believe that they were not legally married at the time they entered into the second

marriage. As such, this provision refers only to the accused's reasonable belief regarding the status of his or her *first* marriage. It is therefore irrelevant to the purported status of the second marriage.

In sum, construing "purports to marry" to include both licensed and unlicensed solemnized marriages is consistent with both the plain language of the statute and its legislative objective of preventing "all the indicia of marriage repeated more than once." *Green*, 2004 UT 76, ¶ 47. One the other hand, reading "purports to marry" to exclude unlicensed, solemnized marriages would contradict the statute's plain language and undercut its clear legislative objective. Defendant's bigamy conviction based on "purports to marry" is therefore valid.

POINT III

DEFENDANT WAS ON NOTICE THAT HIS MARRIAGE TO HIS 16-YEAR-OLD SISTER-IN-LAW WAS ILLEGAL UNDER THE "PURPORTS TO MARRY" PRONG OF THE BIGAMY STATUTE; HE WAS ALSO ON NOTICE THAT HIS INVALID BIGAMOUS MARRIAGE WOULD NOT BE A DEFENSE TO UNLAWFUL SEXUAL CONDUCT

Defendant argues that reading "purports to marry" to include unlicensed marriages would render the bigamy statute void for vagueness, because ordinary persons would not be on notice that unlicensed, solemnized second marriages are prohibited. Br. Aplt. 41-44. He likewise contends that this reading of the bigamy statute would void Utah Code Ann. § 76-5-401.2 (West 2004), the unlawful sexual conduct statute. Br. Aplt. 42-43.

Defendant bases this second claim on Utah Code Ann. § 76-5-407 (West 2004), which makes marriage to the alleged victim a defense to unlawful sexual conduct with a 16- or 17-year-old.

In effect, defendant argues that if his relationship with Ruth constituted a "marriage" for purposes of the bigamy statute, consistency requires that it also shield him from the charge of unlawful sexual conduct with a minor. Conversely, if his relationship with Ruth does not constitute a "marriage" for purposes of a defense to the unlawful sexual conduct statute, neither can it serve as the basis of the bigamy charge. Defendant contends that this "inconsistent use of the term 'marry'" rendered both statutes so vague that it was "impossible for [him] to decide in advance of actual prosecution whether his informal religious marriage to [Ruth] constituted criminal bigamy and whether their subsequent sexual activity was a crime." Br. Aplt. 42.

This Court need not reach defendant's vagueness claim with respect to the bigamy statute because, as explained in Point II, defendant's bigamy conviction rests on the independent ground of cohabitation. Thus, even if this Court were to hold that the phrase "purports to marry" is unconstitutionally vague, defendant's bigamy conviction would still stand.

In any event, defendant's claim fails because ordinary persons would understand that the bigamy statute prohibits defendant's specific conduct of marrying his sister-in-law in a religious wedding ceremony that pronounced them "legally and lawfully husband and wife." Defendant's vagueness challenge to the unlawful sexual conduct

statute likewise fails because ordinary persons would also understand that an unlawful second bigamous marriage is not be a defense to the crime of having sex with a minor.

A. The "purports to marry" prong of the bigamy statute is not unconstitutionally vague as applied to defendant's conduct.

As explained in Point I, defendant may not facially challenge the bigamy statute because he has not shown that it implicates any First Amendment freedom. Rather, he may challenge the statute as vague only as applied to his specific conduct. *See Green*, 2004 UT 76, ¶¶ 43-45. The question, then, is whether "purports to marry"—if it includes unlicensed marriages— is sufficiently definite "to have adequately warned [defendant] that his conduct was proscribed." *Id.* at ¶ 46.

Any person of ordinary intelligence would readily recognize that defendant purported to marry Ruth, even though he never procured a marriage license. Defendant asked for Ruth's hand from her father. He and Ruth participated in a religious wedding ceremony that bore all the indicia of a legal marriage. She wore white. The ceremony included witnesses, the exchange of vows, and a religious official who pronounced the couple "legally and lawfully husband and wife." Only after the ceremony did they engage in sexual intercourse. *See generally Statement of Facts*; State's Exs. 1, 2; Defense Ex. 4. Given these facts, "it is difficult to see how [defendant] could be unsure whether he might be ["purporting to marry"] within the meaning of Utah's bigamy statute." *Green*, 2004 UT 76, ¶ 47. Indeed, in the words of this Court, defendant's

conduct "produced precisely the situation that bigamy statutes aim to prevent – all the indicia of marriage more than once." *Id.*

"Purports to marry," therefore, is not unconstitutionally vague as applied to defendant's conduct.

B. Defendant was also on notice that he could not use his invalid bigamous marriage as a defense to the unlawful sexual conduct charges.

A person commits unlawful sexual conduct when he has consensual sexual intercourse with a 16- or 17-year-old who is ten years his junior. Utah Code Ann. § 76-5-401.2. This statute does not apply "to consensual conduct between persons married to each other." Utah Code Ann. § 76-5-407(1). As stated, defendant claims that if his unlicensed relationship with Ruth constituted a "marriage" for purposes of the bigamy statute, then consistency requires that he be able to use their "marriage" as a defense to unlawful sexual conduct with a 16- or 17-year-old. Again, defendant's void-for-vagueness claim can be reviewed only as applied to his specific conduct. *See Green*, 2004 UT 76, ¶¶ 43-45.

Defendant's vagueness challenge to the unlawful sexual conduct statute rests solely on how "purports to marry" is interpreted in the bigamy statute. The question, then, is whether an ordinary person would believe that because he has purported to marry a 16-year-old plural wife in an unlicensed wedding ceremony, they are "married to each other" for purposes of the unlawful sexual conduct with a minor statute.

The answer is no. The one fact all the parties agree upon is that defendant and Ruth were not "married" to each other. The jury found that he purported to marry her; defendant denies even this. No one who disputes that he even purported to marry an underage girl can simultaneously claim to have believed that he in fact married her. Thus, no ordinary person presented with these facts would conclude that defendant's "purported" marriage to Ruth would constitute a marriage defense to unlawful sexual conduct with a 16- or 17-year-old.

In sum, a person of ordinary intelligence would readily recognize that while defendant purported to marry Ruth, which is all the bigamy statute requires, he did not in fact marry her, which is what the statutory defense to unlawful sexual conduct requires.

POINT IV

THE VICTIM'S TESTIMONY CONCLUSIVELY ESTABLISHED THAT DEFENDANT COMMITTED AT LEAST TWO COUNTS OF UNLAWFUL SEXUAL CONDUCT IN UTAH; TESTIMONY THAT DEFENDANT MIGHT HAVE ALSO COMMITTED THE SAME

OFFENSE IN ANOTHER STATE WOULD NOT HAVE REBUTTED THAT TESTIMONY[6]

Defendant asserts that his two unlawful sexual conduct convictions must be reversed because the State did not "produce affirmative evidence of jurisdiction over the specific charged acts." Br. Aplt. 54. That is, the State did not present sufficient evidence at trial that defendant committed the two counts of unlawful sexual conduct in Utah. *Id.* at 52-54.

In Utah, jurisdiction is not an element of the offense to be decided by the jury at trial beyond a reasonable doubt. Rather, jurisdiction is a threshold legal question for the judge to decide before trial by a preponderance of the evidence. The State, therefore, was not required to present evidence at trial that the offenses happened in Utah. To the extent that defendant argues the trial court erred in not determining jurisdiction before trial, he has waived that claim. While defendant asserted below that jurisdiction was an element of the offense for purposes of the preliminary hearing and trial, he never asked the trial court to determine jurisdiction by a preponderance of the evidence before trial. In any case, the State conclusively proved that defendant committed the charged offenses in Utah when Ruth testified at trial that defendant had sexual intercourse with her several times in their Hildale, Utah home during the charged periods.

A. Proceedings below.

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[6]This point responds to Point V, pages 51-54, of defendant's brief.

The charges. Defendant was initially charged with three counts of unlawful sexual conduct with a 16- or 17-year-old. R1-3. As stated, a person commits unlawful sexual conduct if he has sexual intercourse with a 16- or 17-year-old who is 10 years his junior. *See* Utah Code Ann. § 76-5-401.2 (West 2004).

The first count in the information alleged that defendant had sexual intercourse with 16-year-old Ruth in Utah on December 11, 1998, the day they married. R2. The next count charged that defendant had sexual intercourse with 16-year-old Ruth in Utah, sometime between December 13, 1998 and April 1999. R2. Their first child, Miranda, was conceived during this charged period. R523:458-61. The third count alleged that defendant had sexual intercourse with 17-year-old Ruth in Utah, sometime between January 1, 2000 and June 1, 2000. R2-3. Their second child, Winston, was conceived during this time frame. R523:459-61.

Preliminary hearing. Although Ruth initially authorized her civil attorney to accept service of a subpoena for the preliminary hearing, she withdrew that authorization after she settled her child custody suit with defendant. R520:11, 28-31; *State's Ex.* 3. She then refused to appear at the preliminary hearing, as she had previously promised, absent personal service of a subpoena. R57-38; R520:28-31. Ruth refused to give her attorney an address or telephone number where she could be reached. R529:29. Despite obtaining a short continuance, the State was unable to locate and serve Ruth before the preliminary hearing.

At the preliminary hearing, the State proved that defendant had sex with Ruth when she was 16 and 17 by introducing the birth certificates of her two children and defendant's civil deposition acknowledging that both children were his. R520:6, 89-90. The State used the civil depositions of defendant, Susie, and Wendy to prove that throughout the charged periods, defendant and Ruth lived in defendant's Hildale, Utah home and defendant took turns sleeping with each wife in her separate bedroom. R520:70-75, 77, 80-81.

The magistrate dismissed the first unlawful sexual conduct charge because the State did not produce any evidence that defendant had sexual intercourse with Ruth on their wedding night. R520:100-01. Defendant conceded, however, that the State had shown probable cause that he had had sex with Ruth during the other two charged time periods, but argued that the State offered no evidence that the sexual conduct occurred in Utah. R520:95-96. The State argued that the court could reasonably infer that the sexual conduct occurred in Utah because the family home was in Utah and both children were born in Utah. R520:98.

The magistrate found probable cause to support the other two unlawful sexual conduct counts based on defendant's concession of sexual intercourse. R520:99. The magistrate also found probable cause to believe that both children were conceived in Utah because defendant and Ruth had cohabited only at the Hildale home and both children were born in Utah. R520:99. Defendant did not raise the jurisdictional issue again until trial.

Trial. Ruth reluctantly appeared at trial under subpoena. RR522:6-7, 38-52. Before Ruth testified, defendant argued that the State should have to prove not only that he had sex with Ruth in Utah during the charged time periods, but also that the two children were conceived in Utah. *See* R523:380-90. Defendant theorized that he had been bound over only on two specific sexual acts—those resulting in the conception of the children. R523:390. Thus, defendant reasoned, the State should have to prove where conception occurred in order to show jurisdiction. R523:389-90. The trial court rejected defendant's argument, ruling instead that the State had only to prove that defendant twice had sex with Ruth in Utah during the charged periods. *Id.*

Ruth testified that after she married defendant on December 11, 1998, they regularly engaged in sexual intercourse in defendant's Hildale, Utah home. R523:455, 457-58. Ruth also testified that she discovered she was pregnant with Miranda in January or February 1999. R523:458. Miranda was born full-term on October 5, 1999. R523:459-61.

Ruth then testified that after Miranda was born, she and defendant continued to engage in regular sexual intercourse in their Hildale, Utah home. R523:460. She subsequently became pregnant with Winston, who was born full-term on October 16, 2000. R523:460-61.

On cross-examination, defense counsel asked Ruth if she could say "whether or not conception of [her] first two children occurred in the State of Utah." R524:512. The trial court sustained the State's objection to the question on relevance grounds.

R524:512-13. Defendant did elicit, however, that before the birth of each of her first two children, Ruth had traveled with defendant outside Utah once, "possibly twice," a month for anywhere "from two to four days." R524:514.

After the State rested, defendant unsuccessfully moved to dismiss the two unlawful sexual conduct counts because the State had not presented any evidence that conception occurred in Utah. R524:551, 553-54. Defendant did not dispute that he repeatedly had sex with Ruth in Utah during the charged periods, that Ruth was 16 or 17 at the time of the offenses, or that he was more than ten years her senior. *Id.*

The trial court instructed the jury that they could convict defendant of unlawful sexual conduct only if they first found that defendant intentionally had sexual intercourse with Ruth, sometime within the charged periods "in Utah." R343-44.

B. The State was not required to produce evidence at trial that defendant committed the offenses in Utah.

"A person is subject to prosecution in this state for an offense which he commits, . . . if: (a) the offense is committed either wholly or partly within the state." Utah Code Ann. § 76-1-201(1) (1999). An offense is committed at least partly within this state "if either the conduct which is any element of the offense, or the result which is such an element, occurs within this state." Utah Code Ann. § 76-1-201(2) (1999).

In Utah, jurisdiction is not an element of the offense to be decided by the jury beyond a reasonable doubt. *See* Utah Code Ann. § 76-1-501(3) (1999). Rather, the judge, if requested, must decide before trial whether Utah has jurisdiction over the

offense. *See id.*; Utah Code Ann. § 76-1-201(5); *see also State v. Payne*, 892 P.2d 1032, 1033 (Utah 1995) (holding that judge, not jury, must resolve any factual disputes necessary to settle jurisdictional question). The State has the burden of proving jurisdiction by a preponderance of the evidence. *Id.* A preponderance of the evidence means that a fact is "more likely than not." *Harken Southwest Corp. v. Bd. of Oil, Gas, and Mining*, 920 P.2d 1176, 1182 (Utah 1996). *See also Koesling v. Basamakis*, 539 P.2d 1043, 1046 (Utah 1975).

Because jurisdiction is not element of the offense or a jury question, the State was not required to produce evidence at trial that the offenses were committed in Utah. Any failure by the State to do so, therefore, does not entitle defendant to a reversal of his unlawful sexual conduct convictions.

C. Defendant has waived any claim that the trial court erred in not deciding jurisdiction by a preponderance of the evidence before trial.

Defendant faults the trial court for not ruling on jurisdiction "at the preliminary hearing as he was obligated to do." Br. Aplt. 52. The trial court, however, did rule on jurisdiction at the preliminary hearing. When defendant argued that the State had adduced no evidence that the charged crimes took place in Utah, the trial court stated that it could reasonably infer that the conduct occurred in Utah because defendant and Ruth cohabited only in their Utah home and both children were born in Utah. R520:95-99. It is true that the trial court based its ruling on the lower probable cause standard. But this was because defendant incorrectly asked the trial court to find jurisdiction as an element

of the crime for purposes of the bindover. Defendant never followed up by asking the court to decide jurisdiction by a preponderance of the evidence. Defendant, therefore, has waived any claim that the trial court did not address the issue under the proper burden of proof.

But even if defendant had asked, the evidence at preliminary hearing did prove by a preponderance of the evidence that defendant twice had sex with an underage Ruth in Utah. As explained, the State adduced evidence from birth certificates and the depositions of defendant, Susie, Wendy, that defendant lived with his three wives—including Ruth—in a single Utah home. Each wife had a separate bedroom and defendant took turns spending the night with each in her respective bedroom. Finally, defendant twice impregnated Ruth, with both children being born in Utah. R520:6, 70-90. Taken together, these facts give rise to the reasonable inference that it was "more likely than not" that defendant had sex with Ruth at least twice in their Hildale, Utah home during the charged periods.

D. In any case, the State proved beyond a reasonable doubt at trial that defendant committed two acts of unlawful sexual conduct in Utah.

Even if the trial court could not have found jurisdiction based on the preliminary hearing evidence, the State conclusively proved at trial that the offenses happened in Utah when Ruth testified that she and defendant regularly engaged in sexual intercourse in their Hildale, Utah home. Defendant dispenses with this proof by claiming, as he did below, that the State had to prove not only that he had sex with Ruth in Utah, but also

that Ruth conceived both children in Utah. Br. Aplt. 52. Defendant reasons that because he was "bound over only on the two specific instances leading to conception," the "charges at trial were therefore necessarily limited to those two charged acts." *Id.* Because there was no evidence proving where conception occurred, defendant surmises that the jury had no basis for finding that the charged crimes occurred in Utah. *Id.* at 52-54.

The State, however, was not required to prove where conception occurred in order to show jurisdiction. Rather, the State had only to show that the offense was committed wholly or partly within Utah. *See* Utah Code Ann. § 76-1-201(1)(a). As stated, an offense is committed partly within the state "if either the conduct, which is *any element of the offense*, or the result *which is such an element*, occurs within this state." Utah Code Ann. § 76-1-201(2) (emphasis added). Thus, to prove jurisdiction, the State had to prove only that defendant committed at least one *element* of the crime in Utah or that at least one element resulted in Utah.

Conception is not an element of the crime of unlawful sexual conduct. The elements of unlawful sexual conduct with a 16- or 17-year-old are that the accused had sexual intercourse with a 16- or 17-year-old who was ten years his junior. *See* Utah Code Ann. § 76-5-401.2. The State never has to prove that conception resulted from the act of intercourse, because conception is not an element of the crime. The State has to prove only that an act of sexual intercourse occurred. The State can, however, use the fact of conception to prove the element of sexual intercourse.

That is what the State did at preliminary hearing. Using the conceptions to prove probable cause, however, did not turn conception into an element of the crime that the State was now required to prove at trial. Such a result would be absurd given that neither conception, time, nor place are elements that the State is required to prove. *See* Utah Code Ann. § 76-5-401.2 (elements of unlawful sexual conduct); *State v. Fulton*, 742 P.2d 1208, 12 13 (Utah 1987) (time is not element of offense); Utah Code Ann. § 76-1-501(3) (existence of jurisdiction and venue are not elements of the offense). Nor did using the conceptions at preliminary hearing limit the charges to the two specific acts of intercourse that resulted in conception. Defendant was neither charged nor bound over for impregnating Ruth. Rather, he was charged and bound over for having sexual intercourse with her at least twice during the charged periods. Consequently, while conception was relevant to prove that defendant committed the charged crimes, it was not an element that the State had to prove at trial.

Defendant finally claims that the trial court should have allowed him to question Ruth about whether conception might have occurred outside Utah. Br. Aplt. 53. Defendant's query was irrelevant to jurisdiction. Defendant has never disputed that he had sexual intercourse with Ruth several times in Utah during the charged periods. Evidence that he might have also had sexual intercourse with Ruth in another state during the charged period would not have deprived Utah of jurisdiction over the charged offenses. To the contrary, it would have only established that another state might have had independent jurisdiction to prosecute additional crimes committed there.

In sum, it is uncontroverted that defendant had sexual intercourse with Ruth at least twice during the charged periods. Utah therefore had jurisdiction to prosecute him.

POINT V

EXPERT TESTIMONY REGARDING THE RELIGIOUS, SOCIAL, AND CULTURAL ASPECTS OF DEFENDANT'S POLYGAMOUS COMMUNITY WAS NOT RELEVANT TO ANY FACT THE JURY WAS REQUIRED TO FIND; ACCORDINGLY THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING IT

The defense unsuccessfully sought to call two expert witnesses at trial to explain the religious, social, and cultural background of defendant's polygamous community. The first expert, a legal historian, would have detailed the history of Mormon polygamy in Utah, testified that polygamy was a sincerely-held tenet of defendant's faith, and explained that the marriages in defendant's polygamous community were essentially all arranged by their "prophet." R524:558-61, 608-19. The second expert, a licensed psychologist, would have testified that there was "no demonstrable evidence" that children in plural families were more likely to be victims of abuse than children in monogamist families and that polygamists in defendant's community "downplay[ed] love and romance as the basis of marriage, minimize[d] sexual pleasure and eroticism, [and]

emphasize[d] the role of women as homemakers and as subordinate partners to males." R524:558-60, 619-37.

Defendant argued below that the State opened the door to this expert testimony when it referred in its opening statement to "heartache and closed doors and children being victims." R524:559. The trial court excluded the proffered expert testimony as not being relevant and therefore unhelpful to the trier of fact. R524:565, 569-70. Defendant challenges that ruling on appeal. Br. Aplt. 55-57.

A trial court has "wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard." *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794. An appellate court will not reverse a trial court's decision to admit or exclude expert testimony "'unless the decision exceeds the limits of reasonability.'" *Id.* (quoting *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993)).

Under rule 702, Utah Rules of Evidence, an expert may testify to "scientific, technical, or other specialized knowledge," if his testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." This Court has held that before expert evidence can be admitted under rule 702, the trial court must determine "whether, 'on balance, the evidence will be helpful to the finder of fact.'" *Larsen*, 865 P.2d at 1361 (quoting *State v. Rimmasch*, 775 P.2d 388, 398 n.8 (Utah 1989)). Obviously, expert testimony will only be helpful to the trier of fact if it is relevant to "a fact in issue."

Here, the trial court recognized that the proffered expert testimony was irrelevant to any fact that the jury needed to find. The only issue before the jury was whether

defendant had committed the crimes of bigamy and unlawful sexual conduct with a 16- or 17-year-old. Whether defendant was guilty of bigamy required the jury to decide only whether he, knowing he had a wife, either purported to marry or cohabited with Ruth. Whether defendant was guilty of unlawful sexual conduct with a 16- or 17-year-old required the jury to decide only whether defendant had sexual intercourse with Ruth when she was 16 or 17 and whether he was more than ten years her senior.

Expert testimony that defendant's community practiced polygamy for religious reasons, arranged marriages through their prophet, and subordinated women would have done nothing to assist the jury in deciding defendant's guilt. To the contrary, the proffered expert testimony, which spanned nearly 30 pages of transcript, would certainly have diverted the jury's attention from the real issues at hand to completely irrelevant matters.

Defendant nevertheless argues that the expert testimony was necessary to rebut the State's "introduction of evidence implicitly condemning the beliefs and practices of the FLDS Church." Br. Aplt. 56. Defendant first points to the prosecutor's statement in opening referring to "heartache and closed doors and children being victims." This statement, however, was not an invitation for the defendant to fill the record the irrelevancies. Rather, his remedy was to object or to respond in his own opening statement. Defendant chose to do the latter. *See* R523:420, 422-43.

Defendant also points to testimony that he claims "cast [him] and the beliefs and practices of the FLDS Church in a negative light, implying that they were responsible for

[Ruth's] relative lack of education, her willingness to enter into a polygamous relationship, her accepting the advice of the FLDS prophet to marry [defendant], her concealment from outsiders of her relationships with [defendant], and her acceptance of government welfare benefits." Br. Aplt. 55. All that evidence, however, was relevant to the specific circumstances surrounding the charged crimes in this case. Defendant was permitted to elicit testimony that went to those facts. *See* R523:480-94, 505-14; R524:583-90.

The proffered expert testimony, however, would not have addressed those specific facts. Rather, it would have addressed only the general beliefs of the FLDS Church and the culture of defendant's community. As stated, that general testimony would not have aided the jury in determining defendant's guilt or innocence.

Accordingly, the trial court did not abuse its discretion in excluding irrelevant expert testimony.

POINT VI

DEFENDANT DOES NOT HAVE A FUNDAMENTAL DUE PROCESS RIGHT UNDER *LAWRENCE V. TEXAS* TO HAVE MORE THAN ONE SPOUSE OR TO ENGAGE IN SEXUAL RELATIONS WITH A MINOR; EVEN IF HE DID, THE STATE HAS AN OVERRIDING COMPELLING INTEREST IN DEFINING AND REGULATING MARRIAGE AND IN PROTECTING MINORS FROM SEXUALLY EXPLOITIVE RELATIONSHIPS

Defendant relies on the U. S. Supreme Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), to argue that he has a substantive due process right to have more than one spouse at a time and to have sexual intercourse with a minor. Br. Aplt.

57-65. The narrow holding in *Lawrence* — that consenting adults have a due process right to engage in private, consensual sexual activity — does not support defendant's claim that he has a fundamental right to practice bigamy or to have sex with a minor. Nor do the other substantive due process cases defendant cites. Even if defendant did have such a right, it must give way to the State's legitimate and compelling interest in preserving the social institution of marriage and protecting minors from sexually exploitive relationships.

A. Neither *Lawrence v. Texas* nor its predecessors create a substantive due process right to practice bigamy.

Relying on *Lawrence*, defendant essentially argues that he has a fundamental right to engage in any marital-type relationship that he chooses and that the State has no legitimate interest in proscribing bigamy or even sex with minors, if the actors happen to be consensual bigamous partners. Br. Aplt. 57-65. Defendant reads the holding in *Lawrence* too broadly. At issue in *Lawrence* was a Texas criminal statute that prohibited homosexuals from engaging in sodomy. *Lawrence*, 539 U.S. at 562. Lawrence and another adult man were arrested and convicted under that statute for engaging in private, consensual sodomy. *Id.* at 562-63. The Supreme Court invalidated the Texas statute, holding that consenting adults are free to engage in private sexual conduct "in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." *Id.* at 564.

In reaching this holding, the Supreme Court concluded that adults have a substantial protected liberty interest "in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572. The Court further held that Texas's sole stated objective of promoting morality was not a "legitimate state interest which [could] justify [the State's] intrusion into the personal and private life of the individual." *Id.* at 578. *See also id.* at 582-83 (O'Connor, J., concurring in the judgment).

The *Lawrence* majority, however, drew a distinction between private sexual conduct by consenting adults, which a state could not regulate, and the kind of public social institutions and sexually exploitive relationships that a state could legitimately regulate:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Id. at 578. Thus, while *Lawrence* held that a state has no legitimate interest in interfering with the private intimate relationships of consenting adults, it recognized that a state has a clear legitimate interest in protecting minors and other vulnerable persons from sexually exploitive relationships and in determining which social relationships are worthy of formal recognition. *Cf. id.* at 567 (noting that state should not define meaning of or limit relationships "absent injury to a person or abuse of an institution the law protects).

The holding in *Lawrence*, then, is a narrow one: the State does not have a legitimate interest in meddling in the private, sexual conduct of consenting adults. Yet defendant seeks to expand this holding into a boundless one: the State has no legitimate interest in defining the parameters of the social institution of marriage or in regulating extra-marital sexual relations between adults and minors. Defendant does this by reducing marriage to a private right of sexual relations between consenting adults.

The marital relationship, however, is "'not merely a private romantic declaration or religious right.'" *Green*, 2004 UT 76, ¶ 71 (Durrant, J., concurring) (quoting Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 774 (2002)). Nor is marriage "simply about the right to have sexual intercourse." *Lawrence*, 539 U.S. at 567. Rather, marriage is "a civil contract" upon which "society may be said to be built," and out of which "spring social relations and social obligations and duties, with which government is necessarily required to deal." *Reynolds v. United States*, 98 U.S. 145, 166 (1878). *See also Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (describing marriage as "the most important relation in life" and as "the foundation of family and of society, without which there would be neither civilization nor progress"). As the most basic social unit, marriage is a relationship "in which the state is vitally interested." *Green*, 2004 UT 76, ¶ 71 (Durrant, J., concurring) (citations omitted).

Marriage, then, is not a private relationship, but "'a state-conferred legal status, the existence of which gives rise to the rights and benefits reserved exclusively to that particular relationship.'" *Id.* (quoting *Universal Life Church v. State*, 189 F. Supp. 2d

1302, 1315 (D. Utah 2002)). "It is precisely because marriage is a state-created institution that states have a compelling interest in defining the parameters of marital relationships, and in regulating the procedures, duties, and rights that stem from those relationships." *Green*, 2004 UT 76, ¶ 71 (Durrant, J., concurring) (citations omitted).

The Supreme Court has long recognized that marriage, as a state-created social institution, "'has always been subject to the control of the legislature,'" which "'body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.'" *Zablocki v. Redhail*, 434 U.S. 374, 399 (Powell, J., concurring in judgment) (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)). *See also Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (area of domestic relations "has long been regarded as virtually exclusive province of the States"); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878) (a state "has absolute right to prescribe the conditions upon which the marriage relations between its own citizens shall be created, and the causes for which it may be dissolved").

Defendant cites to language from several Supreme Court opinions for the proposition that "decisions relating to marriage and family relationships are fundamental liberty interests protected from government interference under the Fourteenth Amendment." Br. Aplt. 60-62 (*e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978); *Maynard v. Hill*, 125 U.S. 190, 208 (1888); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632 (1974); *Loving v. Virginia*, 388

U.S. 1 (1967); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977); and *Griswold v. Connecticut*, 381 U.S. 479 (1965)). The Supreme Court has recognized "the decision to marry as among the personal decisions protected by the right to privacy." *Zablocki*, 434 U.S. at 384. But that does not mean that "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." *Id.* at 386. "To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Id.*

The opinions recognizing the right to marry as fundamental, however, have all either dealt with unfair requirements for participating in the institution of marriage or with matters that clearly fall within the realm of private, personal choice. *See, e.g.*, *Zablocki*, 434 U.S. at 388-91 (state could not require economic means test as prerequisite to marriage); *Loving*, 388 U.S. at 11-12 (state could not ban interracial marriages); *Griswold*, 381 U.S. at 485-86 (state statute forbidding use of contraceptives unconstitutionally intrudes on right of marital privacy). None has held that an individual has a fundamental right to redefine the parameters of a public social institution such as marriage.

Moreover, Utah's bigamy statute does not interfere with the right to marry. The bigamy statute does not prohibit anyone from marrying; nor does it intrude on the right to choose one's marriage partner. Rather, the bigamy statute "draw[s] the line at the *number* of spouses, not their characteristics or status." Marci Hamilton, *The Marriage*

Debate and Polygamy: Several Utah Cases Challenge Whether Anti-polygamy Laws are Constitutional," FindLaw's Legal Commentary, http://writ.news.findlaw.com/hamilton/20040729.html (emphasis added). Thus, the bigamy statute is concerned, not with regulating private marital decisions or even private sexual relationships, but with the protection of the public social institution of marriage as it has been defined by the legislature.

Defendant, therefore, has no fundamental liberty interest in practicing polygamy.

B. *Lawrence* and its predecessors also do not create a fundamental liberty interest in having extra-marital sex with a minor.

Still relying on *Lawrence*, defendant argues that if Utah's bigamy statute is "unconstitutional or inapplicable under the facts of this case, then the state cannot criminalize sexual contact between couples who participate in relationships not granted formal legal recognition." Br. Aplt. 64. Defendant argues that this is true even if one of the partners is a minor. *Id.* "Any attempt to do so," defendant asserts, "would infringe upon the liberty to choose one's sexual partners and to arrange one's family relationships." *Id.*

Defendant's argument implicitly assumes that *Lawrence* grants him a fundamental liberty interest in marrying and having sexual relationships with a minor. As stated, however, *Lawrence* recognized a liberty interest only in private intimate conduct between consenting adults. It expressly declined to extend that interest to sexual relationships between adults and minors and other "persons who might be injured or coerced or who

are situated in relationships where consent might not easily be refused." *Lawrence*, 539 U.S. at 578.

In sum, defendant cites no authority, and the State is aware of none, that holds an individual has a fundamental due process right to either marry a minor or to engage in extra-marital sexual relations with a minor. Indeed, *Lawrence* is quite clear that there is no such right. *See id.*

C. Even if defendant did have a liberty interest in practicing bigamy and having consensual sexual relations with a minor, the State has an overriding compelling governmental interest.

Even if defendant could show a fundamental liberty interest in practicing bigamy or having sex with minors, the State's compelling governmental interests would override those interests. *See Carey v. Population Services Int'l*, 431 U.S. 678, 688 (1977) (state regulations burdening individual's fundamental privacy concerns must be justified by narrowly tailored compelling state interest).

1. The State's compelling interest in prohibiting bigamy.

Defendant essentially argues that other than general principles of morality, the State has no interest in prohibiting bigamy. Br. Aplt. 27-35, 57-65. This Court in *Green*, however, cited several legitimate ends served by the bigamy statute. *See Green*, 2004 UT 76, ¶¶ 37-41.

First, the State has an undeniable interest in defining, protecting, and regulating marriage. *See Green*, 2004 UT 76, ¶ 37; *see also* ¶¶ 71-72 (Durrant, J., concurring);

Potter v. Murray City, 760 F.2d 1065, 1070 n.8 (10th Cir. 1985). As explained, marriage is a state-created institution that serves as "the very 'foundation of family and of society.'" *Id.* at ¶¶ 71-72 (Durrant, J., concurring) (quoting *Maynard v. Hill*, 125 U.S. 190, 211); *see also id.* at ¶ 37. Utah's "interest in regulating marriage has resulted in a network of laws, many of which are premised upon the concept of monogamy." *Id.* at ¶ 38 (citing *Potter*, 760 F.2d at 1070 n.8)).

Second, "prohibiting bigamy implicates the State's interest in preventing the perpetration of marriage fraud, as well as its interest in preventing the misuse of government benefits associated with marital status." *Id.* at 39.

Third, Utah's bigamy statute serves the State's compelling interest "in protecting vulnerable individuals from exploitation and abuse." *Id.* at ¶ 40. As the *Green* court observed, the "practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support." *Id.* at ¶ 40 (citing Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. Legis & Pub. Pol'y 225, 239-45 (2001)). The facts of this and other Utah cases support that observation. *See, e.g., Green*, 2004 UT 76, ¶ 40 n.14 (among polygamist's wives were three sets of sisters and three of his own stepdaughters, one of whom was only 13 when he first had sex with her); *State v. Kingston*, 2002 UT App 103, 46 P.3d 761 (defendant, a polygamist, prosecuted for incest

with his 16-year-old niece). *See generally*, Andrea Moore-Emmet, *God's Brothel* (2004) (detailing stories of 18 modern women who had lived in polygamy). Moreover, "the closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging." *Green*, 2004 UT 76, ¶ 40. Thus, the resulting "'wall of silence may present a compelling justification for criminalizing the act of polygamy, prosecuting offenders, and effectively breaking down the wall that provides a favorable environment in which crimes of physical and sexual abuse can thrive.'" *Id.* (quoting Vazquez, 5 N.Y.U. J. Legis. & Pub. Pol'y at 243). Although the *Green* majority expressed the foregoing governmental interests in rational basis terms, it suggested that they were also compelling. *See Green*, 2004 UT 76, ¶ 41 ("All of the foregoing interests are legitimate, if not compelling, interests of the State"). Two members of the Court, however, expressly stated that they believed the foregoing state interests to be compelling, particularly the State's interest "in regulating and preserving the institution of marriage as that institution has been defined by the State." *Id.* at ¶ 76 (Durrant, J., joined by Wilkins, J., concurring).

In sum, the State has a legitimate compelling governmental interest in banning polygamy that overrides any liberty interest defendant may have in practicing it.

2. The State's compelling interest in prohibiting extra-marital sexual relations between adults and minors.

The State's interest in banning extra-marital sexual relationships between minors and adults is equally, if not more, compelling. As *Lawrence* implicitly recognizes, the

State will always have a compelling legitimate interest in protecting minors from sexually exploitive relationships with adults. *See Lawrence*, 539 U.S. at 578.

Defendant argues, however, that this interest is limited. He bases his claim on the fact that Utah law permits minors over the age of 16 to legally marry if they have the consent of their parents. *Id*. at 64-65. Defendant reasons that if a 16- or 17-year-old can consent to a legal marriage "without any substantive state involvement beyond verification of parental consent," then the State "may not interfere with a religious polygamous relationship involving a 16- or 17-year-old when parental consent has been given." Br. Aplt. 65. In other words, if the State permits parents to consent to a legal marriage between their minor children and an older adult, the State can have no legitimate interest in not allowing parents to also consent to their children's having sexual relations with a much older adult outside a legal marriage. This argument borders on the frivolous.

It is true that Utah has seen fit to allow consensual sexual conduct between adults and 16- and 17-year-olds when under the protective umbrella of a legal marriage to which the minor's parents have consented. But for good reason, the State has not permitted that same conduct outside the legal bonds of matrimony, even when a parent does consent. This is because a legal marriage affords a minor several safeguards that a sexual relationship outside marriage does not. For example, a legal wife has a claim on her husband for support during the relationship. *See* Utah Code Ann. § 76-7-201 (1999). A purported wife does not. If her husband dies or becomes disabled, a legal wife can claim

a marital share of the estate, *see* Utah Code Ann. § 75-2-202 (1999); § 75-2-301 (1998); social security death or disability benefits, *see* 42 U.S.C. § 402 (West 2004), and worker's compensation benefits, *see* Utah Code Ann. §§ 34A-2-101 to -803; *Anderson v. United Parcel Service*, 2004 UT 57, ¶ 8, 96 P.3d 903. A purported wife can claim none of these benefits. Should a couple separate or divorce, a legal wife can claim alimony and an equitable share in the marital property, such as the family home, a family business, and her husband's retirement. *See* Utah Code Ann. § 30-3-5 (2003). Again, a purported wife would be forced to leave the relationship with nothing.

Ruth's situation illustrates the wisdom of not allowing parents to consent to their children having sex with considerably older adults outside the legal protection of marriage. First, Ruth was not in a position to easily refuse consent to the illegal marriage. Ruth was not permitted to marry whomever she chose. Nor was anyone in her polygamous community. Rather, the local prophet decided whom members of his community should marry. Although Ruth wanted to legally marry someone else, she was instead told that she should illegally marry her much older brother-in-law, which she did within twenty-four hours. *See generally Statement of Facts*. Defendant suggests that Ruth's decision was voluntarily made, free from any pressure from either himself or the prophet. But 16-year-old Ruth, with only a sixth grade education, lacked the emotional and intellectual maturity to knowingly consider and weigh the ramifications of having a sexual relationship with an older adult outside the legal protections of marriage. And her father, legally charged with protecting her, did not fill that maturity gap by advising her

of those ramifications. Instead, he encouraged her to enter into this illegal relationship because he thought defendant was a good man and "marriage" would settle Ruth down. Thus, it can hardly be said that Ruth was free from all coercion or that she really understood what she was doing.

Second, when Ruth finally decided to leave defendant, she had to leave with nothing but her children. She had no claim on defendant for support, nor did she have any legal interest in the family home or any other marital property. Because she was so young when she married defendant, she had little education and no apparent skills for supporting herself and her children.

Given these facts, and those of other similar cases, the legislature could reasonably assume that it could not always rely on parents to protect their children by withholding their consent to illegal bigamous marriages or other extra-marital sexual relationships. *See, e.g., Green*, 2004 UT 76, ¶ 40 n.14 (polygamist married three of his stepdaughters, one of whom was only 13 at the time); *State v. Kingston*, 2002 UT App 103, ¶ 2, 46 P.3d 761 (defendant married 16-year-old niece as polygamous wife); *State v. Chaney*, 1999 UT App 309, ¶ 2, 989 P.2d 1091 (father arranged illegal marriage between his 13-year-old daughter and 39-year-old man).[7]

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[7]Indeed, it was likely cases such as these that prompted Utah's legislature in 2001 to enact a statute that made it a third degree felony for a parent to consent to an illegal marriage. *See* Utah Code Ann. § 30-1-9.1 (West 2004). In 2003, the legislature made it a second degree felony for an adult, such as a defendant, to marry a minor as a plural wife. *See* Utah Code Ann. § 76-7-101.5 (West 2004).

In sum, even if defendant had a due process liberty interest in having extra-marital sex with a minor, the State's compelling interests would override it.

POINT VII

UTAH'S BIGAMY STATUTE DOES NOT VIOLATE DEFENDANT'S FIRST AMENDMENT FREE EXERCISE RIGHTS BECAUSE IT IS A NEUTRAL LAW OF GENERAL APPLICABILITY.

Defendant argues that Utah's bigamy statute is unconstitutional under the Free Exercise Clause of the First Amendment. Br. Aplt. 78-82. After defendant filed his opening brief, however, this Court held that Utah's bigamy statute did not violate the Free Exercise Clause. *State v. Green*, 2004 UT 76, 507 Utah Adv. Rep. 45.

Green controls this case. Like defendant, polygamist Tom Green challenged the bigamy statute as an impermissible burden on his right to freely exercise his religion. *See id.* at ¶¶ 16-18. This Court rejected that claim for two reasons. First, the Supreme Court had rejected that precise claim 125 years ago in *Reynolds v. United States*, 98 U.S. 145 (1878). Because the Supreme Court has never overruled *Reynolds*, this Court found *Reynolds* controlling. *Green*, 2004 UT 76, ¶¶ 18-19.

Second, this Court concluded that Utah's bigamy statute "would survive a federal free exercise of religion challenge under the most recent standards enunciated by the United States Supreme Court." *Id.* at ¶ 20. Those recent standards hold that "a neutral law of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.*

(citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 876-77 (1990)). *See also Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 522, 531 (1993).

This Court held that Utah's bigamy statute was neutral and generally applicable as defined by *Hialeah*. *Green*, 2004 UT 76, ¶ 22. First, the Court determined that the statute was facially neutral because it "explains what it prohibits in secular terms, without referring to religious practices." *Id.* at ¶ 25. This Court then held that the bigamy statute was also neutral in its real operation: "Utah's bigamy statute does not . . . operate to isolate and punish only that bigamy which results from the religious practices of polygamists. It contains no exemptions that would restrict the practical application of the statute only to polygamists." *Id.* at ¶ 28. The Court declined Green's invitation to assess the statute's neutrality by considering the statute's legislative history and the subjective motives and intent of the lawmakers who enacted the statute. *Id.* at ¶ 29.

The Court next concluded that the bigamy statute was generally applicable because it did "not attempt to target only religiously motivated bigamy." *Id.* at ¶ 31. Rather, "[a]ny individual who violates the statute, whether for religious or secular reasons, is subject to prosecution." *Id.* (citing *State v. Geer*, 765 P.2d 1, 3 (Utah App. 1998)).

Having determined that the bigamy statute was neutral and generally applicable, the *Green* court held that the State was "not required to show that the interests [the statute] serves are compelling or that the statute is narrowly tailored in pursuit of those

interests." *Id.* at ¶ 33 (citing *Hialeah*, 508 U.S. at 531; and *Smith*, 494 US. at 884-86)). Instead, the State had only to show "that the statute is rationally related to a legitimate government end." *Id.* (citing *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004)).

This Court held that the bigamy statute was rationally related to several legitimate government ends, including, as discussed above, the State's interests in regulating marriage, "preventing the perpetration of marriage fraud," "preventing the misuse of government benefits associated with marital status," and "protecting vulnerable individuals from exploitation and abuse." *Green*, 2004 UT 76, ¶¶ 37-40.

Defendant's free exercise challenge thus fails under *Green*.

POINT VIII

BECAUSE UTAH'S BIGAMY STATUTE DOES NOT TARGET ONLY RELIGIOUSLY MOTIVATED POLYGAMY, IT DOES NOT VIOLATE EQUAL PROTECTION

Defendant next argues that Utah's bigamy statute singles out religious polygamists for prosecution. Br. Aplt. 65-66. He contends that the "cohabit" prong of bigamy impermissibly targets the religiously motivated marital practices of polygamists. *Id.* He further asserts that only religious polygamists are prosecuted under the cohabitation provision, "despite the existence over the years of tens of thousands of potential defendants who fall within the definition of criminal bigamy based upon acts of simple cohabitation for nonreligious reasons." *Id.* at 66-67. Thus, defendant concludes, religious polygamists are "disproportionately" and negatively affected by the bigamy

statute's cohabit provision. Defendant claims that this disparate impact, coupled with the statute's discriminatory purpose, invalidates the bigamy statute under both the Free Exercise and Equal Protection Clauses of the federal constitution. Br. Aplt. 65-69.

As explained in Point VII, however, the bigamy statute does not violate the First Amendment's Free Exercise Clause. The defendant in *Green* also argued that "use of the word 'cohabit' in the [bigamy] statute's text amount[ed] to impermissible targeting of the religiously motivated marital practices of polygamists," and that this rendered the statute non-neutral. *Green*, 2004 UT 76, ¶ 24. This Court rejected that claim, holding that it was clear from both the statutory text and the statute's actual operation that the statute did "not attempt to target only religiously motivated bigamy." *Id.* at ¶ 31. Instead, the statute applied equally to all those who violated the statute, "whether for religious or secular reasons." *Id.* (citing *State v. Geer*, 765 P.2d 1, 3 (Utah App. 1988) in which a secular bigamist unsuccessfully argued that the state had selectively prosecuted "only those bigamists who practice bigamy for other than religious reasons").

That holding in *Green* defeats defendant's equal protection claim. The guarantee of equal protection of the laws prohibits a state from discriminating between groups and individuals based on unfair or impermissible classifications. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). However, a facially neutral law that serves "ends otherwise within the power of government to pursue," is not "invalid under the Equal Protection Clause simply because it may affect a greater proportion of one [protected class] than of another." *Id.* at 242. Rather, the party challenging the law must also show the existence

of a discriminatory purpose. *Id.* at 239-42. Defendant cannot make that showing here because *Green* has already determined that the "cohabit" prong did not have a discriminatory purpose. *See Green*, 2004 UT 76, ¶¶ 24, 31.

In any case, the alleged "disproportionate" effect that defendant complains of does not prove a discriminatory purpose; nor is it the kind of discrimination that the Equal Protection Clause was intended to prevent. Defendant asserts that the bigamy imposes a disproportionate burden on the "tens of thousands" of Utah religious polygamists because there "exists no other class of persons among whom the practice of plural marriage is both common and for whom such practice is central to their community and their personal identity." Br. Aplt. 69.

The fact that a particular act inimical to the peace, good order, and welfare of the State may be practiced only by a single group, however, does not make that public policy either illegal or unfairly discriminatory. If the conduct is harmful to others, or to society in general, it can be proscribed, regardless of how many engage in the conduct. For example, a law forbidding adults from refusing to feed their children will have a disparate impact on a religious sect that believes in starving babies to keep them pure. *See, e.g., Nicholson v. State*, 600 So.2d 1101 (Fla. 1992); *State v. Kahey*, 436 So. 2d 475 (1983); *Commonwealth v. Cottam*, 616 A.2d 988 (Pa. Super. 1992). By outlawing the starvation of children, the State has not purposely discriminated against a religious group, even if only one sect engages in such systematic starvation. Nor does a resulting disparate impact prove a discriminatory purpose in such a case.

Likewise, the fact that anti-bigamy laws might have a disproportionate impact on groups that believe in polygamy for religious reasons does not in itself prove purposeful discrimination. *See Green*, 2004 UT 76, ¶ 32 (noting that "adverse impact on religion does not by itself prove impermissible targeting" because "'a social harm may have been a legitimate concern of government for reasons quite apart from [religious] discrimination.'" (quoting *Hialeah*, 508 U.S. at 535)). Accordingly, the bigamy statute does not violate defendant's equal protection rights.

POINT IX

UTAH'S BIGAMY STATUTE DOES NOT INTERFERE WITH DEFENDANT'S RIGHT TO FREELY ASSOCIATE WITH OTHERS TO EXCHANGE IDEAS AND PURSUE EXPRESSIVE GOALS

Defendant argues that the bigamy statute is overbroad because it infringes on his First Amendment right to freely associate with others. Br. Aplt. 70-76. Defendant has not shown, however, how limiting persons to one spouse at a time implicates that right.

"While the First Amendment does not in terms protect a 'right of association,'" the Supreme Court has recognized that "it embraces such a right in certain circumstances." *City of Dallas v. Stanglin*, 490 U.S. 19 (1989). Supreme Court jurisprudence has "referred to constitutionally protected 'freedom of association' in two distinct senses." *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984). "In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our

constitutional scheme." *Id.* at 617-18. In those cases, "freedom of association receives protection as a fundamental element of personal liberty." *Id.* at 618. Thus, they are analyzed under a substantive due process analysis. *See id.* at 618-19 (citing, *e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-389 (1978); *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965); *Carey v. Population Services International*, 431 U.S. 678, 684-86 (1977); *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

The second line of decisions recognizes that "'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts*, 468 U.S. at 622). To "come within [the] ambit" of expressive free association, "a group must engage in some form of expression, whether it be public or private." *Id.* at 648.

Defendant challenges the validity of the bigamy statute under both senses. Br. Aplt. 70-76. The State, however, will not address defendant's argument under the first line of substantive due process cases because it has already explained in Point VI that the bigamy statute does not implicate any fundamental liberty interest and that even if it did, the State has a compelling governmental interest in proscribing bigamy.

The question then is whether prohibiting bigamy infringes on defendant's right to expressive free association. It is difficult to see how it can. First, the Supreme Court has

never defined the right to expressive association as including a private right to reconfigure the social institution of marriage. Second, nothing on the face of the bigamy statute purports to suppress the free expression of ideas. Prohibiting bigamous relationships does not prevent defendant from associating with others for the purpose of pursuing common political, social, economic, educational, religious, or cultural goals. Nor does it stop him from freely expressing his beliefs. It merely prevents him from having more than one marital relationship at a time.

Defendant suggests that he has an expressive free association right to teach his children that practicing polygamy is essential to their salvation. The bigamy statute, however, does not prohibit him from doing so. Defendant nevertheless contends that he cannot effectively express his belief in polygamy unless he can also model it. Br. Aplt. 74. But defendant cites no authority that the right to freely express ideas includes the right to engage in legitimately prohibited conduct.

Even if defendant could show that the practice of polygamy fell within the ambit of expressive free association, that right, "like many freedoms, is not absolute." *Dale,* 530 U.S. at 648. *Accord Roberts*, 468 U.S. at 628. Rather, expressive association can "be overridden 'by regulations adopted to serve a compelling state interest, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale,* 530 U.S. at 648.

As explained in the preceding points, the State has a compelling state interest in defining the substance and parameters of the social institution of marriage and in

preventing the social ills and abuse associated with the practice of polygamy. *See Green*, 2004 UT 76, ¶¶ 37-40; *id.* at ¶¶ 70-71 (Durrant, J. concurring). Those objectives can be achieved only by prohibiting bigamy.

The bigamy statute, therefore, does not implicate defendant's First Amendment right to expressive free association.

POINT X

THE UNLAWFUL SEXUAL INTERCOURSE STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE AS APPLIED TO DEFENDANT

The Equal Protection Clause of the Fourteenth Amendment "provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws." *State v. Herrera*, 1999 UT 64, ¶ 25, 993 P.3d 854**.** "This provision requires that state laws treat similarly situated people alike unless a reasonable basis exists for treating them differently." *Id.* "Conversely, 'persons in different circumstances should not be treated as if their circumstances were the same.'" *Id.* (quoting *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984)).

As previously noted, the unlawful sexual conduct statute prohibits an adult from having consensual sexual intercourse with a 16- or 17-year-old ten years his junior to whom he is not legally married. *See* Utah Code Ann. § 76-5-401.2 & 76-5-407(1). Also, as explained, a 16- or 17-year-old may legally marry an adult 10 years her senior so long as she and one of her parents consents. *See* Utah Code Ann. § 30-1-9 (West 2004). Thus, while a parent may consent to a 16- or 17-year-old's sexual relationship with an

older adult within the confines of a legal marriage, a parent cannot consent to such a sexual relationship without the benefit of marriage.

Defendant here repeats his substantive due process argument—that so long as a parent consents, the State has no rational basis for allowing older adults to have consensual sex with 16- or 17-year-olds within a legal marriage, but not outside a legal marriage. Br. Aplt. 76-77. As discussed in Point VI.B, however, the State has a perfectly rational basis for treating the two relationships differently—legal marriage affords a minor several important legal protections that an informal, invalid bigamous marriage does not. Thus, it is one thing to allow parents to consent to a legally-sanctioned relationship; it is quite another to allow parents to consent to their children having sex with older adults without any legal protection. The unlawful sexual conduct with a 16- or 17-year-old does not, therefore, violation equal protection.

POINT XI

UTAH'S BIGAMY STATUTE DOES NOT VIOLATE THE UTAH CONSTITUTION WHERE THAT DOCUMENT EXPRESSLY STATES THAT "POLYGAMOUS OR PLURAL MARRIAGES ARE FOREVER PROHIBITED"

In his final point, defendant argues that the bigamy statute is invalid "under the liberty and freedom of conscience provisions of the Utah Constitution." Br. Aplt. 82-97. The express language of Utah's Irrevocable Ordinance, which forever bans polygamous or plural marriages, defeats that claim. Defendant's claim that the Ordinance is invalid,

even if true, would not entitle him to any relief because Utah has never attempted to repeal the Ordinance or its statutory prohibition on bigamy.

A. Utah's bigamy statute is valid under the Irrevocable Ordinance of Utah's Constitution.

As defendant correctly points out, Congress would not grant statehood to Utah absent "some unequivocal constitutional provision prohibiting plural marriage." *State v. Barlow*, 107 Utah 292, 153 P.2d 647, 649-51 (1944). *See also Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 927-28 (Utah 1993); John J. Flynn, *Federalism and Viable State Government — The History of Utah's Constitution*, 1966 Utah L. Rev. 311. Accordingly, when Congress passed Utah's Enabling Act, it required "the inclusion in the State Constitution of the so-called 'Irrevocable Ordinance' which forever prohibits polygamous marriages." *Barlow*, 153 P.2d at 651. The Ordinance, incorporated into Article III, § 1 of the Utah Constitution provides:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this State:
>
> **[Religious toleration – Polygamy forbidden]**
>
> First: — Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; *but polygamous or plural marriages are forever prohibited.*

(Emphasis added).

Despite the express language of the Ordinance, defendant asserts that the bigamy statute is invalid under several other provisions of the Utah Constitution relating to

religious freedom and due process. *See* Br. Aplt. 83-84 (citing the Preamble ("Grateful to Almighty God for life and liberty . . .); Art. I, § 1 ("all men have the inherent and inalienable right to enjoy and defend their lives and liberties; . . . to worship according to the dictates of their consciences; to assemble peaceably . . .); Art. I, § 2 (All political power is inherent in the people . . ."); Art. I, § 4 ("The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .); Art I, § 7 ("No person shall be deprived of life, liberty or property, without due process of law"); Art. I, § 25 ("This enumeration of rights shall not be construed to impair or deny others retained by the people"); and Art. I, § 27 ("Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."). Defendant does not choose a particular provision for analyzing his claim. Rather, he merely asserts that these provisions demonstrate that "the liberty interests and freedoms of conscience the Utah Constitution protects must be exceptional." Br. Aplt. 85. Thus, defendant contends, this Court "should strive to find maximum protection for individual liberties and freedoms, and should demand compelling justification from the State when it seeks to curtail those rights." Br. Aplt. 85.

A well-established canon of constitutional and statutory construction dictates that "'when two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision.'" *Thomas v. Color Country Management*, 2004 UT 12, ¶ 19, 84 P.3d 1201 (quoting *Taghipour v. Jerez*, 2002 UT 74,

¶ 11, 52 P.3d 1252). Here, the Ordinance expressly provides that despite any other state constitutional guarantee of "perfect toleration of religious sentiment," polygamous or plural marriages are "forever banned." Utah Const. Art. III, § 1. Given that express prohibition on polygamy, as well as the history of Utah's statehood, it is indisputable that the framers of our state constitution did not intend to create a right to practice polygamy under other constitutional provisions.[8]

B. Utah's Irrevocable Ordinance forever banning polygamy is not invalid under the equal footing doctrine.

Defendant argues that the Ordinance is invalid because it violates the equal footing doctrine. Br. Aplt. 90. "The equal footing doctrine embraces the precept that each state is 'equal in power, dignity, and authority,' and that a state's sovereign power may not be constitutionally diminished by any conditions in the acts under which the State was

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[8]Relying primarily on federal law, defendant asserts that he has a liberty interest in practicing polygamy under the state constitution "for essentially the reasons described by the United States Supreme Court in *Lawrence*." Br. Aplt. 86. Then, citing generally to "differences in the text and history between the federal Free Exercise Clause and the several pronouncements of religious freedom in the Declaration of Rights in the Utah Constitution," defendant argues that he has a state free exercise right to practice polygamy. Both claims depend on defendant's contention that the State has no interest, let alone a compelling one, in criminalizing bigamy. As previously explained, however, the State does have a compelling governmental interest in banning bigamy. Thus, even if Utah's Constitution did not expressly ban polygamy, defendant would be unable to show that the bigamy statute violated any other provision of the state constitution. *Cf. Green*, 2004 UT 76, ¶ 70 n.1 (Durrant, J, concurring) (observing that while author would apply strict scrutiny to state constitutional free exercise claims, "because plural marriages are expressly prohibited by the Utah Constitution, any free exercise claim asserting the right to enter into bigamous or polygamous relationships would, under a state constitutional analysis, be subject to a different standard of review") (citations omitted)).

admitted to the Union." *Potter v. Murray City*, 760 F.2d 1065, 1067 (10th Cir. 1985) (quoting *Coyle v. Smith*, 221 U.S. 559, 567, 573, 574 (1911)). Any such conditions imposed by Congress "'would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.'" *Id.* (quoting *Coyle*, 221 U.S. at 559, 567, 573, 574). In other words, any conditions imposed by Congress for statehood are unenforceable against the State if those conditions do not fall within Congress's regulating authority. *See id.*

Royston Potter, another polygamist, presented an identical claim to the Tenth Circuit Court of Appeal with respect to Utah's Enabling Act. *Potter v. Murray City*, 760 F.2d 1065, 1067 (10th Cir. 1985). The Tenth Circuit held that even if the Enabling Act violated the equal footing doctrine, that would not entitle Potter to relief. *Id.* at 1067-68. This was because "[i]f the original ban on polygamy and plural marriage was invalid, the State's power to incorporate such provisions in its Constitution and its laws remained." *Id.* at 1068. In other words, Utah has had "'full power since statehood to enact or amend in the manner provided by its own laws, any constitutional or statutory provisions dealing with the subject of marriage consistently with the Constitution of the United States as the supreme law of the land.'" *Id.* at 1068 (quoting *Potter v. Murray City*, 585 F. Supp. 1126, 1137 (D. Utah 1984)). The Tenth Circuit reasoned that since Utah had not yet attempted to repeal the Ordinance or its statutory prohibition on bigamy, it did not matter if the Enabling Act violated the equal footing doctrine. *Id.* at 1068. *See also Barlow*, 153

P.2d at 654 (observing that even if there were unlawful coercion in the Enabling Act, the State had never attempted to change the State's laws, "[n]or is such an attempt likely").

Ten years later, Utah still has not attempted to repeal the Ordinance or its bigamy statute. Indeed, Utah has shown since *Potter* that it has no interest in lifting the ban on bigamy. *See* Utah Code Ann. § 76-7-10.5 (West 2004) (in 2003, enacting a statute making bigamy with a minor a second degree felony); Utah Code Ann. § 30-1-13 (West 2004) (in 2001, making it a third degree felony for a person to knowing solemnize a marriage without a license); Utah Code Ann. § 30-1-9.1 (in 2001, making it a third degree felony for a parent to consent to his or child entering into an illegal marriage). *See also* Utah Constitutional Amendment 3 (passed by Utah voters in November 2004 and defining marriage as between "a man and a woman"). Rather, Utah's "'prohibition of polygamy as provided by its Constitution and laws, continues to be its settled public policy as does its commitment to monogamy as the cornerstone of its regulation of marriage.'" *Potter*, 760 F.2d at 1068 (quoting *Potter*, 585 F. Supp. at 1137).

In sum, the equal footing doctrine, even if applicable, affords defendant no relief because Utah has never attempted to repeal it or to adopt a contrary public policy.

C. Utah's Irrevocable Ordinance is not invalid under any other federal constitutional provision.

In a further attempt to circumvent the Ordinance, defendant argues that it is invalid under his federal constitutional rights to "due process, equal protection, religious

freedom, and association"rights. Br. Aplt. 89-90. As explained in previous points, however, none of these rights is implicated by prohibiting polygamy.

Defendant then argues at length that the Ordinance was not intended to prohibit "private relationships that do not seek formal recognition of the law." Br. Aplt. 91-97. Rather, defendant argues, the Ordinance "is simply a self-executing agreement of the people to restrain future legislatures from formally endorsing polygamous marriages." *Id.*

Even assuming that interpretation of the Ordinance is correct, it does not help defendant. Defendant's interpretation of the Ordinance does not prevent the legislature from enacting a bigamy statute that does prohibit private relationships that do not seek formal recognition of the law. *See Potter*, 760 F.2d at 1068. As explained in Points I through III, that is precisely what the Utah legislature did here. *See also Green*, 2004 UT 76, ¶ 70 n.1 (Durrant, J., concurring). As also explained, that bigamy statute is constitutionally sound.

In sum, the bigamy statute does not violate the Utah Constitution.

CONCLUSION

Based on the foregoing, the State respectfully requests the Court to affirm defendant's convictions.

RESPECTFULLY SUBMITTED this ____ day of _____, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2004, I caused to be mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to:

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